

FEDERAL COURT OF AUSTRALIA

Hanna v Minister for Immigration and Border Protection [2016] FCA 282

Appeal from: *Hanna v Minister for Immigration and Border Protection*
[2015] FCCA 2856

File number(s): NSD 1555 of 2015

Judge(s): **JAGOT J**

Date of judgment: 29 March 2016

Catchwords: **MIGRATION** – appeal from decision of the Federal Circuit Court – whether primary judge erred in dismissing application for judicial review of a decision to refuse to grant a Partner visa.

Held: Appeal dismissed

Legislation: *Migration Act 1958* (Cth)
Migration Amendment Regulations 2009 (No 7) (Cth)
Migration Regulations 1994 (Cth)
Privacy Act 1988 (Cth)

Cases cited: *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194
Craig v South Australia [1995] HCA 58; (1995) 185 CLR 163
Hanna v Minister for Immigration and Border Protection [2015] FCCA 2856
Kaur v Minister for Immigration and Border Protection [2014] FCA 1251
Minister for Immigration and Border Protection v WZARH [2015] HCA 40
Minister for Immigration and Citizenship v Maman [2012] FCAFC 13; (2012) 200 FCR 30
Minister for Immigration and Multicultural Affairs v SZGMF [2006] FCAFC 138
Minister for Immigration and Multicultural Affairs v Yusuf [2001] HCA 30; (2001) 206 CLR 323
MZAIIB v Minister for Immigration and Border Protection [2015] FCA 1392
MZIYA v Minister for Immigration and Citizenship [2011]

FCA 642; (2011) 121 ALD 291
SZBYR v Minister for Immigration and Citizenship [2007]
FCA 26; (2007) 235 ALR 609
SZMTJ v Minister for Immigration and Citizenship (No 2)
[2009] FCA 486; (2009) 232 FCR 282
SZNMJ v Minister for Immigration and Citizenship [2009]
FCA 1345; (2009) 112 ALD 284

Date of hearing:	29 February 2016
Registry:	New South Wales
Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	59
Counsel for the Appellant:	The appellant appeared in person
Counsel for the Respondents:	Ms R Francois
Solicitor for the Respondents:	DLA Piper Australia

ORDERS

NSD 1555 of 2015

BETWEEN: **JOSEPH HANNA**
 Appellant

AND: **MINISTER FOR IMMIGRATION AND BORDER**
 PROTECTION
 First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

JUDGE: **JAGOT J**

DATE OF ORDER: **29 MARCH 2016**

THE COURT ORDERS THAT:

1. 1. The appeal be dismissed.
2. 2. The appellant pay the first respondent's costs of the appeal as agreed or taxed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

JAGOT J:

1 This is an appeal from orders of the Federal Circuit Court of Australia (the **FCCA**)
dismissing an application for judicial review of a decision of the Migration Review Tribunal
(the **Tribunal**). The Tribunal affirmed a decision refusing to grant the appellant a Partner
(Migrant) (Class BC) visa (*Hanna v Minister for Immigration and Border Protection* [2015]
FCCA 2856).

2 I consider that the appeal should be dismissed.

Background to the appeal

3 The appellant is a citizen of Lebanon. He applied for a Partner (Migrant) (Class BC)
visa on 5 October 2010, following his marriage in Lebanon on 22 August 2010 to the sponsor
of this visa. On 10 June 2011, after the sponsor's return to Australia on 28 October 2010, the
appellant was granted a Partner (Provisional) (Subclass 309) visa, which enabled him to
travel to Australia. He arrived in Australia on 28 June 2011. By letters dated 20 and 28 July
2011, however, the sponsor withdrew her sponsorship, claiming that she was the victim of
domestic violence at the hands of the appellant. The then Department of Immigration and
Citizenship (the **Department**) advised the appellant by letter (the date of which is not
apparent) that his application for a permanent resident visa on spouse grounds could be
considered despite the end of the relationship with his spouse in three circumstances, one of
which was that he was a victim of domestic violence.

4 By letters dated 14 October and 14 December 2011, information was provided on
behalf of the appellant, accepting that the relationship with the sponsor was no longer
continuing, but alleging that the appellant had been the victim of family violence perpetrated
by the sponsor. In accordance with r 1.23(10)(c)(i) of the *Migration Regulations 1994* (Cth)
in force at the time (the **Regulations**), this claim was referred to an independent expert. The
independent expert concluded that the appellant was not a victim of family violence - a view
which the Minister for Immigration and Border Protection (the **Minister**) was required to
accept pursuant to r 1.23(10)(c)(ii). Following an invitation to comment upon this adverse
conclusion and the appellant's response, a delegate of the Minister refused the appellant's
application on 2 January 2013 on the basis that while the delegate accepted that the sponsor
and the appellant had been in a genuine and continuing relationship before the relationship

had broken down, the appellant had not established that he was the victim of domestic violence and thus was not entitled to be granted a partner visa.

5 On 16 January 2013, the appellant lodged an application for review of this decision with the Tribunal. As part of the process before the Tribunal, the appellant requested access to the files of the Department and the Tribunal and, on 24 January 2014, was granted access other than to certain pages which the Tribunal decided should not be released based on certificates issued under ss 375A and 376 of the *Migration Act 1958* (Cth) (the **Act**) and s 14 of the *Privacy Act 1988* (Cth). The appellant also lodged further information in support of his application. He then attended a hearing before the Tribunal on 5 February 2014. The Tribunal informed the appellant that it had to be satisfied that the appellant and the sponsor had had a mutual commitment to a shared life as a husband and wife to the exclusion of all others before the issue of the appellant being a domestic violence victim was relevant. The appellant gave information during and after the hearing (in response to an invitation from the Tribunal) in support of his case.

6 On 4 March 2014, the Tribunal affirmed the delegate's decision on the basis that, as the sponsor was not committed to a shared life with the appellant and had not been so committed at any time, the appellant was not the "spouse" of the sponsor within the meaning of s 5F(2) of the Act. As a result, the Tribunal found the appellant did not meet cl 100.221(2) (b) of Schedule 2 to the Regulations which required the appellant to be a person who would meet the requirements of cl 100.221(2) or (2A) (that is, insofar as relevant, be the "spouse" of the sponsor) except that the relationship between the appellant and the sponsor has ceased.

7 On 24 March 2014, the appellant filed an application in the FCCA seeking judicial review of this decision. As summarised at [34] of the primary judge's reasons, the grounds of review in the FCCA were as follows:

- i) the MRT did not take [the appellant's] evidence into consideration;
- ii) a letter from Dr Selim, submitted by the applicant's wife to the Department of Immigration and Border Protection ("the Department"), was forged;
- iii) that an apprehended Violence Order ("AVO") against him was later dismissed; and
- iv) that the MRT, at the behest of the sponsor, ignored his claim that he had suffered family violence.

8 The primary judge dismissed the application, affirming that "the MRT's findings and conclusions were open to it on the evidence and material before it, and for the reasons it

gave” (see [35] of the reasons). In respect of each of the identified grounds, the primary judge found that:

- 0 • “the MRT understood the claim being made by the applicant; explored those claims with the applicant at a hearing and had regard to all material provided in support” (at [62]);
- 1 • the information in Dr Selim’s letter, although adverse to the appellant’s claims, was provided to the appellant orally in accordance with s 359AA of the Act , and the Tribunal’s adverse findings regarding the relationship were predominantly based on the appellant’s own evidence (at [42]-[52]); and
- 2 • the Tribunal was correct in not considering the claims of family violence (and by extension, the AVO), having determined that there was no genuine spousal relationship (at [53]-[58]).

The appeal grounds

9 9 On 2 December 2015, a notice of appeal was filed in this Court. This notice identified six grounds of appeal in the following terms:

1. The Administrative Appeals Tribunal as well as her honour Judge Emmett erred in not considering the issue of domestic violence contrary to the evidence before the Tribunal that both my exwife and I were in spousal relationship and the fact that I was granted a spouse visa because my relationship was genuine.
2. The Tribunal as well as Her Honour failed to consider Dr Selim’s letter which I was not aware of and which I still believe was fabricated and not genuine.
3. My sponsor was committed to me and I was committed to her as we both lived our marital relationship in all aspects. She only became uncommitted when she resumed her relationship with her Muslim ex boyfriend.
4. I still do not understand the role of Tony Barakat and Dr Allam even though the information was taken as not amounting to a rejection but such information affected the mind of the Tribunal. It was not put to me during hearing.
5. Both the Tribunal and Her Honour failed to consider the behaviour of the Social Worker who failed to provide me a proper interpreter and who was biased and they ignored the problem with the interpreter which was brought to the attention of the Tribunal and Her Honour.
6. The decision of the Tribunal as well as Her Honour was made contrary to the evidence on file which should not lead to a dismissal of application.

10 10 The appellant did not file any written submissions, but appeared at the hearing on 29 February 2016. In addition to the grounds in the notice of appeal the appellant submitted that the primary judge’s decision should be set aside because:

- 3 • although the Tribunal had invited him to submit further information within the two weeks following the hearing, he did not do so on advice from his solicitor because he was facing criminal charges and “my solicitor advised me never to talk about it”; and
- 4 • the Tribunal member had referred to the criminal charges pending against him at the beginning of the hearing which made him “stressed” and “scared”.

Adjournment applications

11 11 Before considering the substantive grounds, it is appropriate to record that the appellant made multiple applications to adjourn the hearing, which I refused for reasons which are set out below.

12 12 On 23 February 2016, an interlocutory application was filed on behalf of the appellant, seeking to adjourn the hearing of this appeal for a period of approximately five months to enable separate criminal proceedings against the appellant to be resolved. This application was supported by a letter from the appellant’s legal representatives in the criminal proceedings, stating that the appellant “wishes to use evidence from the criminal proceedings in his argument that he is not a risk to the community” and that “given the sensitive and serious nature of the allegations, [we request] that this evidence not be used or discussed on the record in any way until his criminal proceedings have finalised”. During the hearing, the appellant repeatedly asserted that he did not wish to discuss the criminal proceedings, and was advised by his solicitor to “shut my mouth”.

13 13 I informed the appellant that, as I understood it, he was concerned that things he might say in support of this appeal might incriminate him or be used against him in the criminal proceedings. The appellant appeared to accept that this was his concern.

14 14 I refused to adjourn the appeal on this basis. The criminal charges to which the appellant is subject have nothing to do with the issues which were before the Tribunal. The fact that the appellant believes his sponsor is responsible for initiating the charges against him cannot make the criminal charges relevant to anything the Tribunal or the FCCA had to decide.

15 15 The criminal charges only arose during the hearing before the Tribunal because they explained why the appellant had ceased work. The Tribunal attempted to explain to the appellant that the criminal charges were not relevant but noted that it was the appellant’s

hearing, so he was entitled to talk. The Tribunal repeated that this material was irrelevant at the close of the hearing. It is apparent from the Tribunal's decision that the Tribunal, rightly, did not consider the criminal charges to be relevant to the issue it had to decide.

16 16 In these circumstances it was not possible to see any possible prejudice to the appellant by reason of the appeal proceeding whilst the criminal matter remains pending. As such, I refused the interlocutory application seeking to adjourn the hearing of the appeal.

17 17 During the hearing, the appellant made further applications to adjourn the proceedings, which I rejected. My reasons for doing so follow.

18 18 The appellant requested an adjournment on the basis that he wished to engage legal representation. However, the appellant had ample opportunity to do so before the hearing of the appeal. The Tribunal made its decision on 4 March 2014. The FCCA made its orders on 12 November 2015. A Registrar of this Court made orders on 3 December 2015 provisionally listing the matter for hearing in February 2016. The notice of appeal filed in this Court appears to have been prepared with the benefit of some legal assistance. The appellant is represented in his criminal proceedings. There was no evidence of the appellant having attempted to obtain legal representation before the hearing of the appeal. Accordingly, I was not persuaded that the hearing should be adjourned on this basis.

19 19 The appellant requested an adjournment on the basis that he had received new evidence which indicated that the information from Dr Allam (the subject of ground four in the notice of appeal) was fabricated. In the report of the independent family violence expert to whom the matter was referred, Dr Allam was described as a psychiatrist who had seen the sponsor a number of times. The expert's report identifies a date on which Dr Allam was said to have seen the sponsor. The appellant contended that as the sponsor was in Lebanon on that date Dr Allam's material was fabricated. Leaving aside the question whether the date is a mere typographical error, the relevant point for the purpose of the adjournment application is that the information in the independent expert's report was before the Tribunal. Whether the independent expert's report contained an error or not, that was the form the report took and no subsequent information can expose jurisdictional error on the part of the Tribunal.

20 20 The appellant then requested an adjournment on the basis that a number of documents upon which he wished to rely were not included in the appeal book. However, it ultimately emerged that this material was also not in the appeal book before the FCCA. As noted, the

appellant was refused access to certain material on the relevant files. Given these circumstances it would not have been appropriate to adjourn the hearing of the appeal to enable access to be obtained to material which was the subject of the Tribunal's unchallenged decision not to grant access and which was not before the FCCA. Further, and in any event, the appellant contended that these documents would support his case that he and the sponsor were in a relationship involving a mutual commitment to a shared life which relates to the merits of the Tribunal's decision, not any possible legal error by the Tribunal.

1.1 Ground one

21 21 Ground one contends that the primary judge erred by not considering the appellant's allegation that he was the victim of domestic violence.

22 22 The relevant legal framework was explained by the primary judge as follows:

5. At the time of the decision to grant or refuse a partner visa, the applicant was required to satisfy the requirements in cl.100.221 of Schedule 2 to the Regulations.

6. Clause 100.221(1) of Schedule 2 to the Regulations requires an applicant for a partner visa to meet one of the five alternative requirements provided at cls.100.221(2) to (4A) of Schedule 2 to the Regulations.

7. Relevantly, cl.100.221(2) of Schedule 2 to the Regulations requires that an applicant for a partner visa be the spouse or de facto partner of the sponsoring partner. Further, cl.100.221(4) provides for an exception to the requirement that an applicant for a partner visa be the spouse or de facto partner of the sponsoring partner in circumstances where the applicant has suffered family violence committed by the sponsor.

23 23 As explained at [52]-[55] of the reasons of the primary judge, and as the Tribunal explained to the appellant during the oral hearing before it, the family violence exception is only engaged where the decision-maker is satisfied that a spousal or de facto relationship within the meaning of s 5F of the Act existed between the sponsor and the visa applicant before the relationship ceased. The Tribunal found that no such relationship existed at any time, with the consequence that the question of family violence did not arise for consideration (as in *Kaur v Minister for Immigration and Border Protection* [2014] FCA 1251 at [43]-[44]). The primary judge's conclusion to this effect at [54]-[55] is correct.

24 24 The appellant otherwise contended by reference to numerous documents that his relationship with the sponsor had been a genuine spousal relationship involving mutual commitment at one time, so the Tribunal should have considered his family violence claims. These contentions, however, impermissibly seek to re-agitate the merits of the matter and

cannot provide a basis on which to interfere with the decision of the Tribunal. The primary judge was also correct to reach the same conclusion.

1.2 Ground two

25 By this ground the appellant contends the primary judge erred in not considering a letter from Dr Selim referred to by the independent expert which the appellant believed was “fabricated and not genuine”, and otherwise was not brought to his attention.

26 The contention must be rejected. First, the primary judge considered the issue at [42]-[47]. Second, as the primary judge there noted, the Tribunal complied with s 359A of the Act by giving the appellant clear particulars of this information orally during the hearing (which is permitted by s 359AA), as well as an opportunity to provide further information after the hearing which the appellant took. Third, the appellant’s contentions about the letter being untrue or fabricated cannot alter the fact that the report of the independent expert, in the form which contained the reference to the letter, was before the Tribunal. Subsequent attempts by the appellant to challenge the information cannot support any jurisdictional error by the Tribunal. Finally, the potential relevance of the information was “readily apparent” and the appellant treated it as such in his responsive evidence to which the Tribunal referred at paragraph 30 of its reasons (*SZMTJ v Minister for Immigration and Citizenship (No. 2)* [2009] FCA 486; (2009) 232 FCR 282 at [52]-[53]; cf *Minister for Immigration and Multicultural Affairs v SZGMF* [2006] FCAFC 138 at [41]).

27 For these reasons, no error on the part of the primary judge in this regard is apparent.

Ground three

28 Ground three involves a challenge to the Tribunal’s weighing of the evidence and factual conclusion that the sponsor was never committed to the appellant, despite having married him and sponsored his partner visa.

29 In common with the primary judge’s reasoning at [56]-[63], I consider that the Tribunal’s findings were reasonably open on the material. The consequence is that the appellant’s contentions in this regard do not involve any matter capable of founding a jurisdictional error. The appellant’s contentions are simply that the Tribunal should have reached a different conclusion on the material before it, which is insufficient to enable any interference with the Tribunal’s decision given the confined nature of the jurisdiction of this Court and the FCCA.

1.3 Ground four

Ground four concerns the information from Dr Allam and Mr Barakat. As noted, this material was referred to in the report of the independent family violence expert.

The primary judge held that this information “was not...capable of amounting to a rejection, denial or undermining of the applicant’s claims” and therefore was not required to be put to the appellant under s 359A (at [50]).

I agree.

The report of the independent expert refers to a letter from Mr Barakat having said that the sponsor had contacted her father because she had “had enough and wanted to come home”, and that Mr Barakat had advised him to contact the Department to assist in her return to Australia. This information does not reject, deny or undermine the appellant’s claims that he and the appellant did have a mutual commitment to each other at one time.

The report also refers to Dr Allam having seen the appellant on two occasions. Leaving aside the appellant’s focus on the date of the first meeting (which he says shows the letter is untrue because the sponsor was in Lebanon at the time), the information is that the sponsor was distressed about problems with her husband but her condition had improved by the second meeting.

As discussed, the issue with the date is immaterial because that was the form in which the information appeared before the Tribunal. Otherwise, the existence of problems between the sponsor and the appellant which were apparent when the appellant arrived in Australia was not in dispute. As the primary judge explained at [48]-[49], the Tribunal’s findings regarding the relationship between the appellant and the sponsor “arose primarily from the applicant’s own evidence”. Given the Tribunal’s reasons at paragraphs 46 to 53, this observation was correct.

In these circumstances, the information attributed to Mr Barakat and Dr Allam does not “reject, deny or undermine” the appellant’s claims (*SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26; (2007) 235 ALR 609 at [17]), with the result that s 359A of the Act was not engaged. Further, it is apparent that the Tribunal did not consider this information would be the reason or part of the reason for rejecting the appellant’s claims (*MZIYA v Minister for Immigration and Citizenship* [2011] FCA 642; (2011) 121 ALD 291 at [25] and *SZNMJ v Minister for Immigration and Citizenship* [2009] FCA 1345; (2009) 112

ALD 284 at [50]). While the Tribunal referred to this information in its recitation of the facts at paragraph 16, it made no reference to that information in its reasoning process for rejecting the appellant's claims which is to be found at paragraphs 44 to 58.

Ground five

37 37 Given my conclusion in relation to ground one, ground five, which concerns an issue of interpretation before the independent expert, cannot found any jurisdictional error by the Tribunal.

38 38 The appellant's allegations were made to the Department by letter dated 27 November 2012. The allegations included bias on the part of the independent expert, on a basis which must be rejected as without foundation.

39 39 Otherwise, the allegation of inadequate interpretation cannot have been material to the Tribunal's decision as the Tribunal decided the matter on the basis that there had never been a spousal relationship as required, with the consequence that the issue of family violence did not need to be determined (as to which see above).

40 40 In *Minister for Immigration and Citizenship v Maman* [2012] FCAFC 13; (2012) 200 FCR 30 at [16] Flick and Foster JJ noted that "[t]he role played by an independent expert's opinion obtained by a delegate in any review process subsequently undertaken by the Tribunal is regrettably unclear." At [26] their Honours noted that:

...the Appellant Minister accepts that an independent expert engaged under reg. 1.23(1B)(b) is under a duty to provide procedural fairness to the person who claims to be a victim of domestic violence. The Appellant Minister also accepts that an opinion expressed by an independent expert would not be effective to bind the Tribunal where there has been a denial of procedural fairness in forming the opinion. No submission was advanced on behalf of the Appellant Minister that the statutory scheme gave rise to either an implicit exclusion of the rules of procedural fairness (*Commissioner of Police v Tanos* (1958) 98 CLR 383 at 396 per Dixon CJ and Webb J; *Kioa v West* (1985) 159 CLR 550 at 584 per Mason J; *Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ; *Re Minister for Immigration and Multicultural Affairs, Ex parte Miah* [2001] HCA 22 at [126], 206 CLR 57 at 93 per McHugh J) or an implicit constraint upon the content of those rules.

41 41 For the reasons given, it is not necessary to decide whether the appellant was denied procedural fairness by the independent expert by reason of the inadequate interpretation alleged in his letter of 27 November 2012. If that issue had to be decided, the fact that the appellant was able to submit further information after 28 November 2012 and before the decision of the Minister was made would be relevant as it suggests that the appellant did not

suffer any “practical injustice” or “lost opportunity” as a result, assuming his allegations relating to inadequate interpretation to be true (*Minister for Immigration and Border Protection v WZARH* [2015] HCA 40 at [57]-[60]). In any event, as noted, the fact that the appellant suffered no practical injustice also is apparent from the immateriality of the family violence issue to the Tribunal’s decision.

Ground six

42 42 Ground six challenges the Tribunal’s conclusion on the material before it. In support of this ground the appellant referred to numerous documents in evidence which, he said, showed that (before she decided to return to her ex-boyfriend) he and the sponsor had been in a genuine relationship in which they were mutually committed to a shared life together.

43 43 The difficulty is that the Tribunal reached a conclusion which was reasonably open to it, despite the appellant’s view that a different conclusion should have been reached. It follows that the primary judge was right to find that there was no jurisdictional error by the Tribunal on this basis.

44 44 The appellant otherwise sought to correct various errors in the record about an interim apprehended violence order made against him. The errors, however, are simply immaterial to the decision the Tribunal reached.

45 45 Insofar as this ground might relate to the absence from the appeal book of certain documents identified above, and the appellant’s submission that this constituted a “fabricated” basis for the Tribunal’s decision, or otherwise “distorted” his reputation, I reject this submission as it is without legal foundation.

Other contentions

46 46 The contention that the appellant was deprived of a fair hearing because he had been told by his legal representative in the criminal proceeding to say nothing cannot be sustained. First, it is clear that the appellant said much before the Tribunal, despite being told by the Tribunal the criminal charges were irrelevant. Second, and as the primary judge stated at [61]:

...[t]here is nothing in the MRT’s decision record to suggest that the appellant did not have a real and fair opportunity to put whatever he wished and to participate in the hearing in a way from which it can be concluded that the hearing was fair and thus that administrative justice was done.

47 In these circumstances, what the appellant chose to put (or not to put) before the Tribunal was a matter for him. As Mortimer J stated in *MZAIB v Minister for Immigration and Border Protection* [2015] FCA 1392 at [126], if any remedy in relation to advice he might have received exists, it is not a matter which affects the validity of the decision in issue.

48 The appellant's complaint about the Tribunal's questions of him in relation to the criminal charges is also unsustainable. As noted, the appellant introduced the matter in response to the Tribunal member asking when the appellant had stopped working. The appellant again introduced the matter as part of an allegation that the sponsor had "set up" the appellant because one of his accusers was a friend of the sponsor. While the appellant undoubtedly found the subject stressful, the Tribunal was responding to the information the appellant wished to put before it. Further, it is apparent that when the issue of the criminal proceedings was raised the Tribunal noted that the appellant seemed "a little bit agitated", or "excited", and offered the appellant a brief break, an opportunity the appellant took on the second occasion it was offered. In any event, the Tribunal attempted to explain the irrelevance of this issue to the appellant on a number of occasions. Additionally, after explaining that it appeared the sponsor was never committed to a relationship with the appellant, the Tribunal gave the appellant a further two weeks to submit any further material which he wished in response (which he did).

49 No error is apparent from this aspect of the hearing before the Tribunal.

One final matter

50 One final matter should be addressed. The Tribunal's decision erroneously refers to both the current and repealed legislation but does so in circumstances where there is no material difference between the two.

51 At the date of the Tribunal's decision on 4 March 2014, cl 100.221(2)(b) of Schedule 2 to the Regulations required an applicant for a Partner (Migrant) (Class BC) visa be a "spouse or de facto partner of the sponsoring partner". Spouse was defined in the following terms in s 5F of the Act:

5F Spouse

(1) For the purposes of this Act, a person is the spouse of another person if, under subsection (2), the 2 persons are in a married relationship.

(2) For the purposes of subsection (1), persons are in a married relationship if:

- (a) they are married to each other under a marriage that is valid for the purposes of this Act; and
- (b) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and
- (c) the relationship between them is genuine and continuing; and
- (d) they:
 - (i) live together; or
 - (ii) do not live separately and apart on a permanent basis.

(3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.

52 52 Pursuant to s 5F(3) of the Act, r 1.15A provided the following elaboration:

1.15A Spouse

(1) For subsection 5F(3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F(2)(a), (b), (c) and (d) of the Act exist.

(2) If the Minister is considering an application for:

- (a) a Partner (Migrant) (Class BC) visa; or
- (b) a Partner (Provisional) (Class UF) visa; or
- (c) a Partner (Residence) (Class BS) visa; or
- (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

(3) The matters for subregulation (2) are:

- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
- (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and

- (ii) the living arrangements of the persons; and
- (iii) any sharing of the responsibility for housework; and
- (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
- (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.

53 53 Prior to the commencement of the *Migration Amendment Regulations 2009 (No 7)* (Cth) on 1 July 2009 which substituted the provisions as set out above, "spouse" was not defined in the Act, but in a single regulation in the following form:

1.15A Spouse

(1) For the purposes of these Regulations, a person is the spouse of another person if the 2 persons are:

- (a) in a married relationship, as described in subregulation (1A); or
- (b) in a de facto relationship, as described in subregulation (2).

(1A) Persons are in a married relationship if:

- (a) they are married to each other under a marriage that is recognised as valid for the purposes of the Act; and
- (b) the Minister is satisfied that:
 - (i) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and
 - (ii) the relationship between them is genuine and continuing; and
 - (iii) they:
 - (A) live together; or
 - (B) do not live separately and apart on a permanent basis.

...

(3) In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for:

- (ad) a Partner (Migrant) (Class BC) visa; or
- (ae) a Partner (Provisional) (Class UF) visa; or
- (af) a Partner (Residence) (Class BS) visa; or
- (ag) a Partner (Temporary) (Class UK) visa;

the Minister must have regard to all of the circumstances of the relationship, including, in particular:

- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one party to the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses;
- (b) the nature of the household, including:
 - (i) any joint responsibility for care and support of children, if any; and
 - (ii) the parties' living arrangements; and
 - (iii) any sharing of responsibility for housework;
- (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married or in a de facto relationship with each other;
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities;
- (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.

54 In other words, the amendments relocated the definition of “spouse” relating to a married relationship and the characteristics associated with it from r 1.15A(1A) of the Regulations to s 5F of the Act. The substance of the provisions is to the same effect.

55 The Tribunal must be taken to have been aware of the provision in force at the date of its decision because it referred to the relevant provisions in paragraphs 7 and 8 of its reasons and attached the relevant version of r 1.15A to those reasons.

56 However, when it came to expressing its conclusions the Tribunal referred also to the provisions as they existed before their repeal in 2009 (shown in italics below):

52. ... The Tribunal is satisfied on the evidence before it that the parties at no time, including the time of application and time of decision had a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is not genuine and continuing. They therefore did not meet, at any time the requirements of *r.1.15A(1A)(b)(i) and r.1.15A(1A)(b)(ii)* for a married relationship.

53. The Tribunal finds that the applicant does not meet the requirements for a spouse relationship in s.5F(b) – (d) of the Act as there is not a mutual commitment to a shared life as husband and wife to the exclusion of all others; the relationship is no longer genuine and is not continuing; and the applicant and the sponsor do not live together and live apart on a permanent basis.

54. Additionally, the Tribunal finds that the applicant and sponsor are not living together and are living separately and apart on a permanent basis. Accordingly, they do not meet the requirements of *r.1.15A(1A)(b)(iii)* for a married relationship.

55. For these reasons the Tribunal finds that at the time of decision the applicant and the sponsor are not in a married relationship within the meaning of *r.1.15A(1A)* and therefore do not satisfy the definition of ‘spouse’ in r.1.15A.

56. The Tribunal therefore finds that at the time of the decision the applicant is not the spouse within the meaning of r.1.15A of the Regulations, of the sponsor who is the sponsoring spouse. Therefore, the Tribunal finds that the applicant does not meet cl.100.221(2)(b) for the grant of a Subclass 100 visa.

57 The Tribunal’s references to sub-regulation 1A of regulation 1.15A are in error. For obvious reasons it is necessary for a decision-maker such as the Tribunal to identify the correct legislation under which it is making a decision and a failure to do so may involve an error which vitiates the decision because the decision-maker can be shown to have acted on an erroneous basis (*Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163 at [14], *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323 at [84], *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194 at [85]).

58 58 In the present case the reference to the repealed version of the legislation does not disclose any misapprehension by the Tribunal of the task it was required to perform. The error made is purely formal and cannot be said to have affected, in any way, the function the Tribunal performed. The correct legal test was applied. This is not to say the error should be repeated. The legislative amendments came into force in 2009. References to the repealed legislation in reasons published in 2014 are undesirable to say the least.

Conclusion

59 59 I am not satisfied that the primary judge erred or that any jurisdictional error on the part of the Tribunal has been demonstrated or exists. Accordingly, the appeal should be dismissed with costs.

I certify that the preceding fifty-nine (59) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jagot.

Associate:

Dated: 24 March 2016